

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. :	3729 of 2021
Date of filing complaint:	01.10.2021
First date of hearing:	02.11.2021
Date of decision :	16.11.2022

1. Smt. Kiran W/o Sh. Sanjay Chawla 2. Sh. Sanjay Chawla S/o Sh. C.D. Chawla Both RR/O: 11D-10 DDA Flats, Sector-23B, Dwarka, Delhi	Complainants
Versus	
M/s Advance India Projects Limited Regd. office: 232B, 4th Floor, Okhla Industrial Estate, Phase-III, New Delhi-110020	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Sandeep Chaudhary (Advocate)	Complainants
Sh. Harshit Batra (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for

violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details	
1.	Name of the project	"AIPL Joy Street", Sector-66, Gurgaon	
2.	Nature of project	Commercial colony	
3.	RERA registered/not registered	157 of 2017 dated 28.08.2017	
		Valid up to	31.12.2020
4.	DTPC License no.	7 of 2008 dated 21.01.2008	152 of 2008 dated 30.07.2008
	Validity status	20.01.2022	01.08.2016
	Licensed area	2.8875 acres	13.55
	Name of licensee	Landmark Apartments Private Limited	Ananya Land Holdings





5.	Allotment letter dated	19.09.2018 [As per page no. 36 of reply]
6.	Unit no.	Service apartment no. 1525 on 15 th floor [As per page no. 36 of reply]
7.	Unit area	704.31 sq. ft. (Super area) [As per page no. 36 of complaint]
8.	Relocation of unit	03.11.2018 [As per page no. 38 of reply]
9.	Revised unit no.	Service apartment no. 901 on 9 th floor [As per page no. 39 of reply] (Builder buyer's agreement has been executed in regard of this unit no. only)
10.	Revised unit area admeasuring	709.70 sq. ft. [Super area] [As per page no. 39 of complaint]
11.	Date of builder buyer agreement	26.11.2018 [As per page no. 26 of complaint]
12.	Total sale consideration	Rs. 53,19,201 (BSP) Rs. 64,34,424.80 (TSC) [As per page no. 30 of complaint]
13.	Amount paid by the complainants	Rs. 30,39,862/- [As per page no. 81 of complaint]
14.	Possession clause	Clause 5 of agreement <i>The Promoter shall abide by the time</i>

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		<p><i>schedule for completing the project, handing over the position of the unit to the allottee and the common areas to the association of allottees or the governmental authority, as the case may be, as provided under rule 2(1)(f) of Rules 2017 by 31st December 2020 as disclosed at the time of registration of the project with the authority or such extended. As may be intimated and approved by authority from time to time the completion of the project shall mean grant of occupation certificate for the project.</i></p> <p><i>(Page 36 of complaint)</i></p>
15.	Due date of possession	31.12.2020 [As per clause 5 of agreement]
16.	Demand letter & their reminder letter dated	23.05.2018, 06.10.2018, 21.10.2018, 05.11.2018 03.08.2021, 06.10.2021 [As per page no. 117-120 of reply]
17.	Request for surrender of unit by the complainants	16.06.2020 [As per page no. 63 of complaint]
18.	Reminder for surrender of unit	18.06.2021, 23.06.2021, 08.07.2021 & 12.07.2021
19.	Occupation certificate	28.09.2020 [As per page no. 129 of reply]
20.	Offer of possession	03.08.2021 [As per page no. 74 of complaint]

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B. Facts of the complaint:

3. That in the month of May, 2018 the representatives of the respondent approached the complainants and represented that that it would be developing a mixed-use commercial project having retail, commercial and serviced apartments at one place situated at a prime location having excellent connectivity by the name and style of "AIPL Joy Street" situated at Sector 66, Sub-Tehsil Bad Shahpur, Gurugram. It further stated that the project would be a very good opportunity for the complainants whether they want to start any of their own business or want to secure a regular rental income for the family. The said project has been under construction since 2014 and would be delivered within a year's time and moreover offered a customised payment plan for the said project.
4. That the complainants believing the assurances and representations so stated to be true and correct on 23.05.2018 booked a unit in the said project.
5. That the respondent got executed their standard form agreement to sale dated 26.11.2018, wherein it agreed to sell the service apartment space bearing unit no. 901, 9th floor, admeasuring carpet area of around 28.70 sq. metres and super area of 65.93 sq. mts. for a total sale consideration of Rs. 57,45,021.50/-.



6. That the said sale consideration was agreed to be paid as per schedule F of the agreement whereby an amount equivalent to 50% was payable by 120 days of booking and the rest 50% was to be paid at the time of offer of possession.
7. That the complainants on 28.01.2018 as per their obligation and in readiness and willingness to own the said unit and to the satisfaction of the respondent paid an amount of Rs. 25,56,130/- vide cheque bearing no. 989173 as per the agreed payment. It is pertinent to mention herein that the balance payment was to be made at the time of offer of possession.
8. That the complainants during the said time were having sufficient funds and capacity. The complainants had a regular job as Manager General with M/s Sapient Consulting Private Limited and was earning more than one lakh rupees as monthly salary, at a package of around Rs. 16 lakhs per annum and the said unit was booked and agreed to be purchased hoping good future prospects of the complainants.
9. That the respondent miserably failed in completing the construction and development of the project by the year 2020 and in the meantime the whole world was struck with the unanticipated medical and health emergency on the outset of the COVID 19 pandemic leading to preventive

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shut downs and lockdowns all over the world affecting the financials of many businesses.

10. That owing to the COVID 19 pandemic the employer of the complainant no. 2 in view of cost cutting went into relieving employees in various departments and so was the complainant no. 2 relieved of his services w.e.f. June 2020.
11. That the complainants faced unanticipated hardship and anxiety due to the ongoing health emergency and thus, started looking for fresh jobs in the otherwise gloomy market conditions and even reconsidered the decision of owning the said unit and sent an email dated 16.06.2020 to the respondent wherein asking for refund upon surrender. Pertinent to note that the project was already delayed by that date. Upon which the parties had repeated discussions and the complainants pleaded incessantly for refund even after deduction of the necessary charges but the respondent did not pay any head to their requests and instead started threatening for forfeiture of the entire amount and finally vide email dated 17.06.2020, it denied to the request for surrender of the complainants.
12. That the complainants on the job front as well could secure a job on much less the amount he was already employed and could be employed for only Rs. 72,000/- per month subject to TDS. Also, the complainants



no. 1's personal ventures did not give any result and she was also struggling and only confined to home all through.

13. That since then they have been regularly chasing the respondent's executives and representatives for being considerate and resolve the issue but to no avail. They also wrote successive emails dated 18.06.2021, 23.06.2021, 8.07.2021 and 12.07.2021 but nothing further was initiated by it and in fact on personally contacting, it presented various dishonest offers of taking over the entire money and then stating there is no process of cancellation/surrender or refund.
14. That despite the complainants wanting to surrender and withdrawn from the project and seeking refund of the amount due to drastic change in conditions because of unprecedented health emergency and resulting financial stress & job loss, the respondent was already enjoying the fruits of the hard-earned money of the complainants and not completing the project in a timely manner. The respondent abused its dominant and superior position and illegally issued an offer of possession letter dated 3.08.2021 whereby they were called to make payment of Rs. 42,98,276/-.
15. That the respondent on one hand failed to complete the project in a timely manner and having availed the fruits of the money of the complainants illegally denied cancellation and refund since June, 2020



and instead issued a wrongful demand letter despite the fact that the project is in no manner complete as on date.

16. That the complainants are very much entitled to withdraw from the project due to the unexpected & unprecedented events leading the agreement and the performance of the obligations to be onerous and frustrated and the respondent ought to have cancelled the allotment and agreement with the complainants on 16.06.2020 and thus, its act of denying the cancellation and refund is per se illegal.
17. That the respondent company in the event of unforeseen events is very much entitled to deny performance of obligations and refund the money without interest within 90 days of such event, similarly and on account of parity the complainants are entitled to refund of the amount paid without any deduction and once the respondent failed to pay the same as demanded the respondent are liable to refund the amount along with interest.
18. That the respondent failed to abide by the project deadlines as assured and the terms of license no. 7 of 2008 as the project is not even complete till date and the offer of possession dated 3.08.2021 is also silent as to the fact of availing the occupation certificate.



C. Relief sought by the complainants:

19. The complainants have sought following relief(s):

- i. Direct the respondent to declare agreement to sale dated 26.11.2018 be null & void w.e.f 06.06.2020 and refund the amount paid by them along with prescribed rate of interest from 06.06.2020 till actual refund.
- ii. Direct the respondent pay an amount of Rs.5,00,000/- as compensation for mental agony.

D. Reply by the respondent

20. The respondent has contested the complaint on the following grounds and made following submissions: -

- i. That the complainants have not approached the court with clean hands as have nowhere divulged the Authority with the fact that they have been in constant defaults in making good on their part of the obligations. They are willful and persistent defaulters in making the payments and have willfully concealed that fact thereof and approached this forum with half cooked and manipulated stories is a grave violation of the doctrine of clean hands and hence, this complaint is liable to be dismissed on this ground alone.
- ii. That the complainants being interested in the real estate development of the respondent, known under the name and style of

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"AIPL JOY STREET" at Sector 66, Gurgaon, Haryana (hereinafter, "the Project") tentatively applied for provisional allotment of the unit vide an application form, subsequently they were allotted unit no. 1525 on 15th floor, having super area of 704.31 sq. ft. ("Old Unit") vide allotment letter dated 19.09.2018. As they were unable to procure loan against the said old unit, thus, requested to change the unit vide email dated 18.10.2018.

- iii. That consequently, with utmost bonafide, the respondent agreed to the request of the complainants and reallocated their unit to 901 on 9th floor ("New Unit") vide allotment letter dated 03.11.2018. Prior to such allotment, on the same day, it informed them about the change in area of the re-allotment unit. It was informed that the area of the new unit would be 709.71 sq. ft. and there existed *consensus ad idem* between the parties and consequently, an agreement for sale dated 26.11.2018 (hereinafter "the agreement") was executed between the parties.
- iv. That the total demand raised by the respondent towards the unit inclusive of total sale consideration and other charges was Rs. 73,38,138.90 (Rs. 65,05,394.08/- as principle demanded + RS. 8,32,744.82 as other dues) against which they have only made the payment of Rs.30,39,862.48/- which is approximately 40% of the

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amount demanded, and the same is evident from the account statement dated 04.08.2021.

- v. That the relationship between the parties is contractual in nature and is governed by the agreements executed between the parties. The rights and obligations of the parties flow directly from such agreements. At the outset, it must be noted that the complainants willingly, consciously and voluntarily entered into the agreement after reading and understanding the contents thereof to their full satisfaction. Hence, they are bound by the terms and conditions in the application form, allotment and the agreement. Moreover, the amount payable to the respondent was agreed upon by the parties vide agreement; hence, the respondent is entitled to such payment.
- vi. That the complainants were responsible to make payments timely for the unit to the respondent, according to the terms and conditions of the agreement however, failed to do so after 29.09.2020 and the same is evident through perusal of account statement. It went over and above of its obligation and issued various payment letters and reminders upon non-payment thereon. Details of such letters/reminders are as mentioned below:

S.no	Particulars	Reminder ref no.	Dated
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1.	Reminder I	JOY/RTM/0562	06.10.2018
2.	Reminder II	JOY/RTM/0562	21.1.2018
3.	Reminder III	JOY/RTM/0562	05.11.2018
4.	Reminder IV	JOY/RTM/0562	06.10.2021

They cannot be allowed to take benefit of their own wrong. Hence, the complaint is liable to be dismissed with costs against the complainants.

- vii. That despite failure on part of the complainants to make the requisite payment, the development work of the project continued. The respondent, after completing the development of the unit, applied for the grant of occupancy certificate on 16.07.2020 which was consequently granted on 28.09.2020 and legally offered the possession of the unit vide a notice of offer of possession dated 03.08.2021.
- viii. That the entire country was affected due to the advent of the pandemic in 2020. It led to delays in the working of all the authorities and the functioning of the respondent as well and the same was beyond the control of the respondent. However, regardless of the advent of the pandemic, it rightly offered the possession of the allotted unit on 03.08.2021. Moreover, it needs to

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be categorically noted that the work at the project site was also affected by various bans in the construction process through the years of 2016 – 2018, all of which was rightly communicated to the complainants vide letter dated 30.11.2019 and further, vide letter dated 22.02.2019, it communicated the progress of the construction at the project and offered special offer on early payment of balance sales consideration

- ix. That an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession.
- x. That the complainants have consciously and maliciously refrained from obtaining possession of the unit. Furthermore, it needs to be categorically noted that after being in receipt of the occupancy certificate, no refund can be rightly granted. The Real Estate (Regulation and Development) Act, 2016 intends to keep both the allottees and the promoter at par with each other. It needs to be categorically noted that the project is near its completion and has already received the occupancy certificate. At such an advanced stage, to direct the refund of the allotment would not only affect the promoter but the real estate sector as a whole.

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- xi. That in the interest of equity, justice and fair play, it must be noted that the respondent has rightly turned to its obligations of delivering the possession of the unit to the complainants and has waited for clearing of dues and taking of possession by the complainants. Hence, no refund should be granted. They should be made to fulfil their obligations under the agreement and Act of 2016 for taking the possession of the unit and clearing their dues. The complainants stand in clear violation of sections 19(6), 19(7), 19(10) and 19(11) of the Act.
21. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

22. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate

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Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

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23. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SCC Online SC 1044 decided on 11.11.2021 and followed in ***M/s Sana Realtors Private Limited & others V/s Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

24. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of ***M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. And M/s Sana Realtors Private Limited & others V/s Union of India & others (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him.

F. Entitlement of the complainants for refund:

F.1 Direct the respondent to declare agreement to sale dated 26.11.2018 be null & void w.e.f 06.06.2020 and refund the amount paid by them along with prescribed rate of interest from 06.06.2020 till actual refund.

25. The project detailed above was launched by the respondent as commercial complex and the complainants was allotted the subject unit bearing no. 1525 on 15th floor admeasuring 704.31 sq. ft. vide allotment letter dated 19.09.2018 which was subsequently changed on request of the complainants to Service apartment no. 901 on 9th floor admeasuring 709.70 sq. ft. vide letter dated 03.11.2018. A builder buyer's agreement detailing area, payment plan and other terms and conditions of allotment was executed in this regard on 26.11.2018 between the parties. As per clause 5 of the said agreement executed between the parties, the possession of the subject apartment was to be delivered by December 2020. It has come on record that against the total sale consideration of Rs. 64,34,424.80 /- the complainants have paid a sum of Rs. 30,39,862/- to the respondent. It is observed that the complainants requested the respondent even before filing of the complaint for withdrawal from the project. The complainants vide letter dated 16.06.2020 requested the respondent to refund the amount as due to financial hardship faced by him. The complainants also wrote letter dated 18.06.2021, 23.06.2021, 08.07.2021 & 12.07.2021 in this regard. The complainants further alleged that the respondent issued demand along with offer of possession dated 03.08.2021 for an amount of Rs. 42,98,276/- and thereafter, issued demand letter dated 06.10.2021.





26. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate but the allottee has been requesting the promoter for refund of his amount even before the OC was obtained. The request of the allottee met with deaf ears and promoter failed to refund the amount. In the present case, the occupation certificate has been obtained by the respondent-builder before due date of handing of possession i.e., 31.12.2020 and the request of surrender by complainants was raised on 16.06.2020. It is a clear case of surrender of unit. The respondent should have refunded the amount paid by the complainants as per clause 7.5 of agreement. Therefore, the respondent has been using the funds of the complainants.
27. As per clause 7.5 of agreement and Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which is provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any

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agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

28. The respondent is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10.25% p.a. on the refundable amount, from the date of surrender i.e., 16.06.2020 till the date of realization of payment.
29. The respondent through its counsel stated at bar, that it has paid assured return to the complainants and requested to adjust the same. Accordingly, the respondent was directed to file details of amount paid on pretext of assured return, to be adjusted. In accordance of same, application on behalf of the respondent was filed on 17.11.2022, to bring on record statement of accounts w.r.t. assured return. As per said documents, an amount of Rs. 3,67,158/- has been paid by it to the complainants on pretext of assured return. The respondent is directed that out of amount so assessed, amount paid on account of assured return, shall be deducted.
30. This is without prejudice to any other remedy available to the allottees including compensation for which she may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.



F.II Direct the respondent to pay an amount of Rs. 5,00,000/- as compensation for mental agony.

31. The complainants are seeking relief w.r.t. compensation in the above-mentioned reliefs. *Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up &Ors.,* has held that an allottees is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the Authority:

32. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:





- i) The respondent/promoter is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018; along with an interest @ 10.25% p.a. on the refundable amount, from the date of surrender i.e., 16.06.2020 till the date of realization of payment.
- ii) The respondent is directed that out of amount so assessed, amount paid on account of assured return (i.e. Rs. 3,67,158/-), shall be deducted.
- iii) A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

34. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.11.2022